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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO OROZCO, et al., Defendants and Appellants.	B208718 (Los Angeles County Super. Ct. No. VA099155)

APPEAL from judgments of the Superior Court of the County of Los Angeles, Philip H. Hickok, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant Ernesto Orozco.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant Rigoberto Espino.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Michael R. Johnsen, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendants and appellants Ernesto Orozco (Orozco) and Rigoberto Espino (Espino) appeal from their judgments of conviction. Orozco challenges his conviction for assault on a police officer with a semiautomatic firearm, arguing that the evidence was insufficient to support the conviction on that count. Both defendants challenge the trial court's imposition of a nine-year upper-term sentence on their principle counts, arguing the trial court imposed the sentence in violation of their Sixth Amendment rights. According to defendants, by sentencing them under amended Penal Code section 1170, subdivision (b),[1] the trial court violated the constitutional prohibition against ex post facto laws.

We hold that the evidence was sufficient to support Orozco's conviction for assault on a police officer with a semiautomatic firearm. We also hold that under *People v. Sandoval* (2007) 41 Cal.4th 825, the trial court, on remand, would have the discretion to resentence defendants to the upper term on their principle counts based on aggravating factors not found true by the jury, which is the same discretionary sentencing scheme that the trial court used to impose the challenged sentences. Under these circumstances, remand for resentencing would be a futile act and of no benefit to defendants. We therefore affirm the judgments of conviction and the challenged sentences.

FACTUAL BACKGROUND[2]

On January 20, 2007, Los Angeles County Sheriff's Department Deputies Stephan Longan and Mark Sunagawa were assigned to the Compton Homocide Task Force working from the Century Station. At around 7:30 p.m., they were taking part in a "saturation" patrol of the area around 81st Street and Miramontes Boulevard in response

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1 All other statutory references are to the Penal Code unless otherwise stated.

2 Orozco challenges the sufficiency of the evidence in support of his conviction for assault on a police officer with a semiautomatic firearm, claiming that because his gun was jammed when he pointed it at the officer, he lacked the present ability to inflict violent injury. Therefore, we state only the facts relevant to that claim.

to an ongoing gang war between the "Florencia 13" and "East Coast Crips" gangs. They were in uniform patrolling in a marked Sheriff's Department patrol car.

Deputy Sunagawa was driving southbound on Miramontes Boulevard when the deputies heard several gunshots. Near the intersection of Miramontes Boulevard and 81st Street, the deputies saw Espino standing with his arms extended, firing a weapon westbound on 81st Street. It appeared to Deputy Longan that Espino was shooting at a target. Deputy Longan immediately exited his vehicle and approached Espino. Espino looked at the deputies and then "took off running" southbound on Miramontes Boulevard. As Deputy Longan started to pursue Espino, Deputy Sunagawa exited the patrol car and began to pursue Espino as well.

While in pursuit of Espino, the deputies heard gunshots coming from the same area where they had first heard gunshots. Deputy Longan turned his attention to the gunshots and saw Orozco, in a "shooting stance," firing a weapon westbound on 81st Street at a target. Deputy Longan immediately "yelled to [his] partner, [to] let him know there was another individual shooting." Deputy Longan shouted, "there's two," and Deputy Sunagawa replied, "I have the runner [Espino]."

Realizing that Orozco could shoot at him, Deputy Longan dove for cover behind a car parked on the north side of 81st Street. He crawled to the front of the car to use the engine block for protection. When Deputy Longan "came up from behind the car and started to look over the car, [he] saw [Orozco] looking directly at [him], pointing a handgun at [him]." Orozco was crouched down behind a palm tree, using it to hide and as a "shield." Deputy Longan "locked" eyes with Orozco. Although Deputy Longan did not hear "bullets whizzing by [him]," he fired because he was "scared to death" and thought he "was going to get shot." As Deputy Longan continued to fire his weapon,[3] he saw Orozco fall forward on his stomach, facing away from the deputy, with his hands by his sides.

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[3] Deputy Longan fired four or five shots at Orozco.

After Orozco went down, Deputy Longan was able to "put out radio traffic letting other units know [the two deputies] were just involved [in] a shooting." He then slowly approached Orozco at gunpoint. As other units arrived at the scene, Deputy Longan was able to walk up to Orozco and ask him if he had been shot. Orozco responded, "I think in my leg." Deputy Longan saw a "Glock" handgun to the right of Orozco, next to a tree.

A Sheriff's Department criminalist recovered a semiautomatic pistol manufactured by Glock from the location where Orozco was shot.[4] The pistol appeared to have jammed in the "firing process." The chamber had a live round in it and there was a second live round "that was partially removed from the magazine . . . [,] the nose of [which] was pushed into the back of the [round] that [was] in the chamber." An additional three rounds were seated in the magazine, for a total of five live rounds in the gun.[5] According to the criminalist, before the Glock could be fired, the shooter would have to clear the jam by removing the magazine to "allow the cartridge that is jammed to fall through the magazine well." Once the magazine was replaced, however, a shooter could pull back the slide, chamber a round, and discharge the gun.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney in a first amended consolidated information charged Orozco in Count 1 with assault on a police officer with a semiautomatic firearm, in violation of section 245, subdivision (d)(2)—a felony. The District Attorney further alleged that Orozco used a firearm within the meaning of sections 12022.53, subdivision (b) and 12022.5, subdivisions (a) and (d). The District Attorney also charged both Orozco and Espino in Counts 3[6] and 4 with assault with a

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[4] The criminalist also recovered two spent shell casings from the Glock at the scene.

[5] When fully loaded, the Glock held ten rounds, nine in the magazine and one in the chamber.

[6] Count 2 was eliminated from the first amended information.

semiautomatic firearm in violation of section 245, subdivision (b)—a felony. As to Count 1, 3, and 4, the District Attorney alleged that (i) Orozco and Espino committed those offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(C); (ii) in the commission of those offenses a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1); (iii) in the commission of those offenses Orozco personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and 12022.5, subdivision (a); and (iv) those offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)1)(A). The District Attorney also alleged as to Counts 3 and 4 that Espino personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and 12022.5, subdivision (a).

Following a jury trial, defendants were found guilty as charged and all the special allegations were found to be true. The trial court sentenced Espino on Count 3 to the upper term of nine years, plus an additional 10 years based on section 186.22, subdivision (b)(1)(C), plus an additional four years pursuant to section 12022.5, subdivision (a) for a total term of 23 years on Count 3; and on Count 4 to a consecutive term of six years and eight months, consisting of two years (one-third the middle term of six years), plus one year and four months (one-third the middle term of four years) pursuant to section 12022.5, subdivision (a), plus three years and four months (one-third the middle term of 10 years) pursuant to section 186.22, subdivision (b)(1)(C). The total sentence was 29 years and eight months.

The trial court sentenced Orozco on Count 1 to the upper term of nine years, plus an additional 10 years pursuant to section 12022.53, subdivision (b), plus an additional 10 years pursuant to section 186.22, subdivision (b)(1)(C), for a total term on Count 1 of 29

years; on Count 3 to a consecutive term of six years and eight months, consisting of two years (one-third the middle term of six years), plus an additional one year and four months (one-third the middle term of four years) pursuant to section 12022.5, subdivision (a), plus an additional three years and four months (one-third the middle term of 10 years) pursuant to section 186.22, subdivision (b)(1)(C); and on Count 4 to a consecutive term of six years and eight months, consisting of two years (one-third the middle term of six years), plus an additional one year and four months (one-third the middle term of four years), pursuant to section 12022.5, subdivision (a), plus an additional three years and four months (one-third the middle term of 10 years) pursuant to section 186.22, subdivision (b)(1)(C). The total sentence was 42 years and four months.

DISCUSSION

A. Substantial Evidence of Orozco's Assault on Deputy Longan

Orozco challenges his conviction for assault on a police officer with a semiautomatic firearm, claiming there is insufficient evidence to support that conviction. Our review of that claim is governed by a substantial evidence standard of review. "'In reviewing [a claim regarding] the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Davis* [(1995)] 10 Cal.4th 463, 509-510.) If we determine that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319

[61 L.Ed.2d 560, 573-574, 99 S.Ct. 2781]), as is the due process clause of article I, section 15, of the California Constitution (*People v. Berryman* [(1993)] 6 Cal.4th 1048, 1083)." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

Orozco contends that he cannot be guilty of assault because his handgun was inoperable at the time he pointed it at Deputy Longan. According to Orozco, to be guilty of an assault with a deadly weapon, a defendant must have the present ability to inflict a violent injury upon the person threatened. (See *People v. Wolcott* (1983) 34 Cal.3d 92, 99.) Orozco argues that because his gun was jammed when he pointed it at Deputy Longan, he lacked the present ability to inflict violent injury on the deputy.

Orozco was convicted of assaulting Deputy Longan with a semiautomatic weapon in violation of section 245, subdivision (d)(2). That section provides: "Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years."

"Penal Code section 240 defines assault as '[an] unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' So defined, assault under California law departs from the common law definition in two crucial respects. First, under the California definition 'a conviction for assault may not be grounded upon intent only to frighten.' (*People v. Burres* (1980) 101 Cal.App.3d 341, 346 [161 Cal.Rptr. 593]; see *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 463 [163 Cal.Rptr. 57]; *People* v. *Puckett* (1975) 44 Cal.App.3d 607, 614 [118 Cal.Rptr. 884].) Second, to constitute an assault, the defendant must not only intend to commit a battery (*People v. Rocha* (1971) 3 Cal.3d 893, 899 [92 Cal.Rptr. 172, 479 P.2d 372]); he must also have the present ability to do so. As the court stated in rejecting the common law rule, '[we] cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded,

or whether the party at whom it was menacingly pointed was thereby placed in great fear.' (*People v. Lee Kong* (1892) 95 Cal. 666, 669 [30 P. 800].) Subsequent cases confirm that 'if a person points an unloaded gun at another, without any intent or threat to use it as a club or bludgeon, he does not commit . . . assault under Penal Code section 240 . . . .' (*People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544 [85 Cal.Rptr. 346]; *People v. Sylva* (1904) 143 Cal. 62, 64 [76 P. 814].)" (*People v. Wolcott, supra*, 34 Cal.3d at p. 99.)

The Supreme Court recently explained the "present ability" element of assault. "[The present ability] element [of assault] is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion. (Footnote omitted.) Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168.)

In *People v. Chance, supra,* 44 Cal.4th 1164, a deputy sheriff in foot pursuit of the defendant executed an evasive maneuver that allowed the deputy to approach the defendant—who was concealed behind a trailer, holding a loaded handgun—from behind. (*Id.* at p. 1168.) Although the deputy ordered the defendant to drop the handgun, the defendant did not immediately comply. (*Ibid.*) The deputy feared that the defendant would turn and shoot him, but after some hesitation, the defendant dropped his weapon, ran, and was arrested. (*Id.* at pp. 1168-1169.) The handgun recovered at the scene was loaded, but did not have a round in the chamber. (*Id.* at p. 1169.) In holding that there was sufficient evidence to support a conviction for assault with a firearm on a police officer, the court explained that the "defendant's loaded weapon and concealment behind the trailer gave him the means and the location to strike 'immediately' at [the deputy], as that term applies in the context of assault. [The deputy's] evasive maneuver, which permitted him to approach defendant from behind, did not deprive defendant of the

'present ability' required by section 240. [¶] . . . [¶] [The] defendant's mistake as to the [deputy's] location was immaterial. He attained the present ability to inflict injury by positioning himself to strike on the present occasion with a loaded weapon. This conduct was sufficient to establish the actus reus required for assault." (*Id.* at pp. 1175-1176.)

Orozco attempts to distinguish this case from *People v. Chance, supra,* 44 Cal.4th 1164, arguing that in this case, although the gun was loaded, it was inoperable due to a jam. But, as Orozco concedes, the court in *People v. Ranson* (1974) 40 Cal.App.3d 317, upheld a conviction for assault with a deadly weapon on a police officer based on the defendant's use of a jammed rifle. In that case, the defendant pointed a rifle at police officers and was observed, "'messing with the gun'" and "'fooling with it somewhere around the firing mechanism.'" (*Id.* at p. 319.) The police officers shot and arrested defendant. (*Ibid.*) The rifle recovered at the scene did not have a round in the chamber, but did have rounds in the magazine clip. (*Id.* at p. 320.) The top bullet in the clip, however, was jammed with its nose pointing downward. (*Ibid.*) In affirming the defendant's conviction for assault with a deadly weapon on a police officer, the court in *Ranson* held that "the conduct of [the defendant] is near enough to constitute 'present' ability for purposes of assault. [¶] We hold that it was not an abuse of discretion under these facts for the trial court to find that [the defendant] had the present ability to commit a violent injury in that he could have adjusted the misplaced cartridge and fired very quickly." (*Id.* at p. 321.)

Orozco contends that *People v. Ranson, supra,* 40 Cal.App.3d 317 is distinguishable because there is no evidence in this case showing that he had the present ability to clear the gun jam and chamber a round quickly. But the Sheriff's Department criminalist testified that the jam could be cleared by removing the magazine and allowing the jammed round to fall from the magazine well. He also explained that once the magazine was replaced, a round could be chambered and the gun fired. That evidence was sufficient to allow a rational trier of fact to infer that Orozco could have cleared the jam and fired the weapon. In addition, Deputy Longan testified that Orozco had taken up position behind a palm tree, using it as a "shield." Thus, there was not only evidence that

the Glock handgun could be cleared and fired, but also that defendant had placed himself in a position that would have allowed him time to do so immediately. As discussed above, regardless of whether Orozco may have been "several steps" from being able to inflict violent injury on Deputy Longan, i.e., he could not have "instantaneously" fired the handgun (*People v. Chance, supra*, 44 Cal.4th at p. 1168), under the facts of this case, a rational trier of fact could have concluded that he had the present ability to clear the jam and discharge the handgun immediately. The evidence was therefore sufficient to support Orozco's conviction for assault on a police officer with a semiautomatic firearm.

B. Upper Term Sentences

Both defendants challenge the trial court's imposition of the upper term sentence on their convictions on their principle counts.[7] According to defendants, by sentencing them under amended section 1170, subdivision (b), which was not in effect when they committed the offenses in issue, the trial court violated the constitutional prohibition against ex post facto laws.

The Attorney General counters that we do not have to reach the ex post facto issue because, under *People v. Sandoval, supra*, 41 Cal.4th 825, the defendants would be resentenced, following a finding of *Cunningham*[8] error, under the discretionary resentencing scheme fashioned by the court in *Sandoval*, which scheme is the judicial equivalent of the legislative scheme adopted in section 1170, subdivision (b). Thus, according to the Attorney General, resentencing would be a futile act and of no benefit to defendants because the trial court would conduct the same analysis at the sentencing hearing that it already conducted under section 1170, subdivision (b) at the original sentencing hearing.

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[7] For purposes of sentencing, Orozco's principle count was Count 1 and Espino's was Count 3.

[8] *Cunningham v. California* (2007) 549 U.S. 270.

In his reply brief, Espino[9] concedes that under *People v. Sandoval, supra,* 41 Cal.4th 825, we should reject his sentencing argument but he preserves that argument for review in federal court. Because we are bound to follow the Supreme Court's holding in *Sandoval,* (*Musser v. Provencher* (2002) 28 Cal.4th 274, 287, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 should), we must reject both defendants' arguments that their nine-year upper term sentences violated the constitutional prohibition against ex post facto laws.

In *Sandoval, supra,* 41 Cal.4th 825, the Supreme Court stated that it was "arguable that the amendments to [section 1170] should be viewed as [changes in procedural law] and that they are, therefore, applicable to any sentencing proceedings conducted after the effective date of those amendments." (*Id.* at p. 845.) The Supreme Court, however, declined to decide that question, and instead invoked its discretionary power to conform the pre-legislation procedural sentencing laws to the procedures implemented by the Legislature in section 1170. (*Id.* at pp. 845-846.) In so doing, the court held that application of those conformed resentencing procedures to crimes committed before the passage of amended section 1170 did not violate either the proscription against ex post facto laws or a defendant's right to due process. (*Id.* at pp. 855-857.) The Supreme Court "conclude[d] that the federal Constitution does not prohibit the application of the revised sentencing process . . . to defendants whose crimes were committed prior to the date of our decision in the present case." (*Id.* at p. 857.)

Accordingly, we agree with the Attorney General that even if we remanded the case to the trial court for resentencing, the trial court would be authorized to impose the upper term sentence on defendants' convictions on their principle counts based on the revised resentencing scheme formulated by the court in *People v. Sandoval, supra,* 41 Cal.4th at pages 843 through 852. There is no indication in the record that a resentencing proceeding would result in a different sentence. We will not reverse for further

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9 In his opening brief, Orozco joined in Espino's challenge to the trial court's imposition of upper term sentences. Unlike Espino, Orozco did not file a reply brief.

proceedings when to do so would be "a useless and futile act and would be of no benefit to appellant." (*People v. Seldomridge* (1984) 154 Cal.App.3d 362, 365; see also *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 121 [no reversal when requested remedy ineffective]; *Charles H. Duell, Inc. v. Metro-Goldwyn-Mayer Corp.* (1932) 128 Cal.App. 376, 385 ["it remains a rule of appellate procedure that a reviewing court will not remand a case where further proceedings therein would be futile"].) Because a remand for resentencing would be a futile act, we affirm the upper term sentences imposed by the trial court.

DISPOSITION

Defendants' convictions and sentences are affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.